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No. 02-

IN THE

Supreme Court of the United States

JEFFREY SALUGA,

Petitioner,

v.

CYRIL TUREK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a Circuit Court may deny a Government official the benefit of qualified immunity when there is a split among other District Courts and Circuit Courts as to whether the constitutional rights allegedly violated was clearly established.

2. Whether an individual who has no objective indicia of a prior injury has a clearly established right not to be handcuffed behind the back after informing an arresting police officer of a prior injury.

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Petitioner respectfully petitions for a Writ of Certiorari to review the judgment of the Sixth Circuit Court of Appeals in this case.

OPINIONS BELOW

The Sixth Circuit opinion (App. A at 1a) Case Nos. 01-3986, 01-4018 was not recommended for full-text publication. District Court opinion (App. B at 10a) Case No 4:00 1672.

STATEMENT OF JURISDICTION

The judgment of the Sixth Circuit Court of Appeals was entered on September 24, 2002. The Court if Appeals entered an order denying a timely petition for rehearing en banc on November 18, 2002 (App. C at 30a).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

This case involves the following statutory provision: 42 U.S.C. § 1983.

STATEMENT OF THE CASE

On July 5, 2000, Turek filed a Complaint in the District Court against the following Defendants: Jeffrey Saluga, both in his individual capacity and in his official capacity as a Deputy for the Mahoning County Sheriff's Department, Randall Wellington, in his official capacity as Mahoning County Sheriff, Mahoning County Sheriff's Department, David Ludt, Vicki Sherlock and Edward Reese, all in their official capacities as

Commissioners of Mahoning County. (R.1 Complaint, Apx. Pg. 10). Turek's Complaint averred that Saluga effectuated an illegal arrest of his person and during said arrest, Turek alleges that he sustained serious bodily injury. (R.1 Complaint, Pgs. 3-7, Apx. Pgs. 12-16). Specifically, Turek asserts claims for the alleged violation of his constitutional rights pursuant to 42 U.S.C. § 1983, as well as state common-law tort claims of false arrest, false imprisonment, malicious prosecution and abuse of process. (R.1 Complaint, Pgs. 9-10, Apx. Pgs. 18-19).

On June 8, 2001, all of the Defendants Motioned the Court for Summary Judgment. (R.36 Motion, Apx. Pg. 62).

On September 12, 2001, The District Court issued a Judgment Entry granting Defendants' Motion for Summary Judgment in part. (R.51 Judgment Entry, Apx. Pg. 346). Specifically, the District Court dismissed Turek's claims of false arrest, false imprisonment, malicious prosecution, abuse of process and illegal arrest, detention and prosecution. (R.51 Judgment Entry, Apx. Pg. 346). However, the District Court denied Defendants' Motion for Summary Judgment concerning Turek's claims of excessive force and unnecessary force only with respect to Defendant Saluga in his individual capacity. (R.51 Judgment Entry, Apx. Pg. 346).

On September 17, 2001, Saluga, in his official capacity, filed a notice of appeal with the Sixth Circuit Court of Appeals. (R.55 Notice, Apx. Pg. 347).

On September 24, 2001, Turek filed a notice of appeal with the Sixth Circuit Court of Appeals. (R.57 Notice, Apx. Pg. 366).

On August 9, 2002, the Court heard oral arguments in the matter.

On September 24, 2002, Circuit Judge Alice M. Batchelder issued the opinion of the panel wherein the Court affirmed the decision of the district court denying Saluga's motion for summary judgment. Saluga therefore timely petitioned for a rehearing en banc, which was denied on November 18, 2002.

STATEMENT OF THE FACTS

For purpose of this Petition, Saluga is required to adopt the facts as set forth in the District Court's Memorandum Opinion. *See Blake v. Wright*, 179 F.3d 1003, 1007 (6th Cir. 1999).

For the convenience of the Court, Saluga will reprint the facts set forth in the District Court's Memorandum Opinion below:

The underlying cause of the events that were to follow was the November, 1998, judgment entry and final divorce decree between Turek and Candace Turek. As former husband and wife, the couple was left with joint ownership of a farm in Ellsworth Township, Mahoning County, over which they agreed that Candace Turek was to be entitled to exclusively reside there until July 30, 1999, but during this time Turek was to be "permitted on the property for purposes of conducting his farm business and for emergency purposes." By July, 1999, Candace Turek had removed her property from the premises and rented an apartment in nearly Canfield. Turek had not moved into the residence but did continue farming operations. On the fateful night of July 21, 1999 (very close to the end of the divorce decree's limit on her occupancy) Candace made accusations which led to Turek's arrest.

Turek claims that he arrived at the farm between 9:00 and 10:00 p.m. after stopping by his girlfriend's residence. He found 10 cars in the drive, doors to the house wide open and a number of underage teenagers drinking including his 19 year old son. Turek threatened to call the police if they did not leave. The teenagers refused so Turek called the Mahoning County Sheriff for assistance. Meanwhile, Turek's son called Candace Turek, who came a few minutes before the deputy sheriff arrived.

Deputy Sheriff Saluga was dispatched and arrived on the farm where he talked to Turek first at about 10:15 p.m. Turek told the deputy sheriff he wanted his sons and friends thrown off his property. Deputy Saluga then spoke to Candace who was sitting on the porch with her son and who happened to have a copy of the divorce agreement with her which she presented to the deputy. On page 6 of this agreement there was a provision permitting Turek's presence for the limited purposes of conducting his farm business and on page 7 of the agreement it provided that Candace Turek "no longer was the marital residence as her primary residence [Turek] shall be entitled to take immediate possession." After speaking to the deputy, Turek went to the barn and claims he was tending his animals. Deputy Saluga after speaking to Candace made the following note in his report.

> After investigating and reading the agreement it was found that Cyril Turek was allowed on the property of 8995 N. Palmyra to attend to his farm animals (3 horses and some chickens) and the approximate time of this maitnance (sic) should only take 1 hour tops. It was found that Mr. Turek had been at the residence at 5:00 p.m. until around 6:30 p.m. left and then returned at 8:30 p.m., until

> the time I arrived at 10:30 p.m. According to his son and ex-wife Candace, his work was done the first time he was there and only returned to hang around and harass them and drink his beer.
>
> Upon speaking with Mr. Turek I did smell a strong odor of an alcoholic beverage about his breath. I asked him when he was planning on leaving because it was 11:00 p.m. and was a little late for doing any more work in the barn. He stated he would be there all night.
>
> I then advised Mr. Turek that it was time for him to leave for the night. He claimed to me he wasn't going anywhere, this was his property and he would do what he wants.
>
> I then advised him he would be placed under arrest for criminal trespass and violating a consent agreement. He stated to me if I wanted him to leave I would have to come in the barn and get him because he wasn't going. Therefore I went in and got him and removed him from the barn, he was placed under arrest and charged with the above. He was then transported to the Mahoning County Justice Center for safekeeping.
>
> The consent agreement states: permitted on property for purposes of conducting his farm business and for emergency purposes *only*.

Saluga found Turek in the barn and Turek was arrested for "criminal trespass" and "violating consent agreement" and charged under Ohio Revised Code § 2911.21 (criminal

trespass) and § 2919.17 (violating a protection order or consent agreement). Deputy Saluga wrote on the arrest supplement that both were misdemeanors of the first degree, but in fact criminal trespass is a misdemeanor of the fourth degree.

According to Turek, Deputy Saluga specifically asked him if there was anything wrong with him. Turek responded that he had an injury to his right arm and shoulder and he requested to be handcuffed in front rather than behind his back. Deputy Saluga did note in his report "bad right shoulder." Nonetheless, Deputy Saluga handcuffed Turek from behind his back and Turek claims the deputy pulled his arms and excessively tightly handcuffed him. Turek claims his hands became n[illegible]b and he complained that his handcuffs were too tight and that he was in pain. However, nothing was done by either Deputy Saluga or the officers who responded to Deputy Saluga's call to remove and transport Turek.

Subsequently, in July, 1999, an assistant county prosecutor reviewing the charges, dismissed them for the reasons, "insufficient witness statements articulating a criminal act" and "case file incomplete at the time to charge the arrestee/alleged defendant." Turek never faced trial on the charges.

Following dismissal of the charges, Turek made an appointment with a neurologist who examined Turek on August 24, 1999 and concluded that the handcuff injury caused a new neurologic injury to the ulnar nerve of the right wrist resulting in loss of function of the right hand. Turek claims to have significant disability due to the loss of function with his right hand.

REASONS FOR GRANTING THE PETITION

I. The Decision of the Sixth Circuit is Incorrect.

In determining that Saluga was not entitled to qualified immunity, the Court found that an excessive force claim may be based on handcuffing. In finding so, the Court relied on its prior decision in *Walton v. City of Southfield*, 995 F.2d 1331, 1342 (6th Cir. 1993). However, the *Walton* decision was rendered prior to this Court's recent decision in *Saucier v. Katz*, 533 U.S. 194 (2001), which fundamentally altered the manner in which the lower Courts are to conduct a qualified immunity analysis. Paramount to said analysis is whether the alleged constitutional violation was clearly established.

In *Walton*, the Court stopped short of determining that the right not to be handcuffed behind the back after allegedly informing the officer of a previous injury was a clearly established right. Instead, the Court affirmed the District Court's denial of qualified immunity because it found that there was a genuine issue if material fact as to whether the officer in fact used excessive force. *Supra*. However, in *Saucier* it was noted that a Court of Appeals errs when it denies summary judgment merely because a material issue of fact remains on the excessive force claim. *Saucier*, 533 U.S. at 522.

Thus, after Saucier the efficacy of the *Walton* decision is indeed very suspect. Consequently, the Sixth Circuit's reliance on *Walton* to establish the violation of a clearly established right in this matter is questionable. The correct approach would have been to define the right allegedly violated in a more particularized sense. A relevant definition

of the clearly established right in this case would be whether Turek has a clearly established right not to be handcuffed behind his back after he allegedly informed Saluga of his previous shoulder injury.

The Sixth Circuit decision failed to cite any decision issued by the Supreme Court or its prior decisions, which discusses and establishes that an individual has a clearly established right not to be handcuffed from behind after advising an officer of a previous injury. Instead, the Court relies on its previous holding in *Walton* for the existence of the clearly established right. However, *Walton* did not even discuss, let alone determine, whether an individual has a clearly established right to be free from tight handcuffing.

Furthermore, assuming Saluga did violate a clearly established right of Turek's, if Saluga made a reasonable mistake, Saluga nevertheless is entitled to immunity.

In *Saucier*, the Court noted that "if the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to qualified immunity." *Id.*

The facts properly before the Court establish that Turek did not display any objective manifestations of any bodily injury. Furthermore, it is also uncontroverted that Turek's arm was not in a sling or cast, nor was Turek using a cane or crutch. Also, Turek did not produce any medical documentation indicating the existence of a prior shoulder injury. Furthermore, Turek informed Appellant that he did farm chores on a daily basis. Turek also instructed Appellant that he had another job at which he did home remodeling work. It is under these circumstances that Court should have examined whether Appellant's actions were mistakenly

reasonable. Clearly, if the Court would have examined the actions of the Appellant under these circumstances, Appellant's mistake was reasonable.

Accordingly, because the decision rendered by the Sixth Circuit is in direct conflict with this Court's decision in *Saucier*, it must be reversed.

II. The Decision of the Sixth Circuit Court of Appeals Conflicts with Decisions of Other Circuits.

Currently there is a split of authority among the circuits as to whether an individual has a clearly established right not to be handcuffed behind the back after informing an arresting officer of a prior injury. While the Sixth Circuit has not addressed the exact issue in this matter, it has observed that an excessive force claim can be based on a claim of tight handcuffing. However, the Ninth Circuit in *Jackson v. City of Bremerton*, 268 F.3d 646 (9th Cir. 2001) determined that an officer did not use excessive force in allegedly pushing subject to ground and kneeling on suspect's back, despite suspect having informed officer of a preexisting back an shoulder injury. Similarly, in *Morreale v. City of Cripple Creek*, 113 F.3d 1246 (Table) 1997 W2 290976 (10th Cir 1997), the suspect, a pianist, requested the arresting officer to handcuff her in front, rather than behind her back, to avoid aggravating a previous shoulder injury. The officer refused, and the suspect later brought a claim of excessive force against the officer. However, the Tenth Circuit opined that the officer was entitled to qualified immunity regardless of the fact that the suspect told the officer she could not be handcuffed with her hands behind her back. The Court found that the allegations of the plaintiff standing alone were insufficient to establish a constitutional violation.

Further, in *Rodriguez v. Farrell*, 294 F.3d 1276 (11th Cir. 2002), the Court determined that a police officer was entitled to qualified immunity despite the fact that the Plaintiff informed the officer of a prior arm injury and the officer allegedly applied overly tight handcuffs. Two District Court decisions also reach a conclusion contrary to the Sixth Circuit; *Hendon v. City of Piedmont*, 163 F. Supp. 2d 1316 (N.D.A. Ala. 2001); *Caron v. Hester* No. CIV 00-394-M 2001 W2 1568761 (D.N.H. Nov 13, 2001).

There is no logical way to reconcile the split of authority between the Sixth Circuit and the other circuit and District Courts. Whether qualified immunity should apply under these circumstances is a very significant issue for law enforcement officers. A law enforcement officer employed in the Sixth Circuit has a greater likelihood of being subject to a civil rights claim predicated on an allegation of tight handcuffing than officers working in other circuits.

It is well settled that if officers of reasonable competence could disagree on whether a clearly established right has been violated in a particular instance, immunity should be recognized. *Malley v. Briggs*, 475 U.S. 335 (1986). Therefore, if esteemed judicial officers with many years of education, training and experience are unable to agree on whether a right is clearly established as a matter of law, the Court must grant the officer qualified immunity. Consequently, in the instant matter, because there is a split of authority among the circuits, the Court must grant this Petition.

III. The Question Presented is Important.

In *Saucier*, the Court reiterated the long standing proposition of law that the "goal of qualified immunity is to avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment." Moreover, in *Saucier*, the Court added the following additional determination a Court should consider when considering a claim of qualified immunity:

> The qualified immunity inquiry, on the other hand, has a further dimension. The concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct. It is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts. An officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense . . . Qualified immunity operates in this case, then, just as it does in others to protect officers from the sometimes hazy border between excessive and acceptable force, and to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful.

Id.

The real issue at play in this instance is to what extent a police officer must give credence to what a suspect tells him. Certainly in these situations there are competing interests at stake between the law enforcement community and the public at large.

On the one hand, police officers have the legitimate purpose of ensuring the safety of the public as well as their own personal safety. Conversely, the individual being arrested has a competing interest in not having unreasonable force applied to him during an arrest. However, if the Courts are to adequately preserve the legitimacy of the qualified immunity defense, the balance must tip in favor of the police officer.

If the Courts were to determine that a police officer is not entitled to qualified immunity under circumstances similar to those faced by Saluga, it would fundamentally alter the manner in which an officer executes an arrest. It is plausible that individuals who have never experienced any prior injury will manufacture the existence of a preexisting injury in an effort not to be handcuffed from behind or at all. When an individual is not displaying any objective outward indicia of injury (cast, brace, abrasion, etc.), yet informs the officer of an alleged prior injury, the officer is faced with a difficult decision.

However, in the event the officer chooses to ignore the allegation that the individual has a prior injury and instead handcuffs the individual, it cannot be said that his actions were unreasonable. If the Court were to hold that an officer could not ignore the statements of the individual, the law enforcement officer's safety could be jeopardized. It is undisputed that an arrestee is much more immobile when handcuffed from behind versus being handcuffed in front. Thus, in situations such as these, the Court must recognize that the officer is entitled to qualified immunity. Accordingly, because the question or issue involved is important, the Petition must be granted.

CONCLUSION

For the reasons set forth above, the Petitioner for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DATED AND FILED SEPTEMBER 24, 2002

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Case Nos. 01-3986, 01-4018

CYRIL TUREK,

Plaintiff-Appellee Cross-Appellant,

v.

JEFFREY SALUGA,

Defendant-Appellant Cross-Appellee,

RANDALL WELLINGTON, Mahoning County Sheriff, et al.,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

BEFORE: KENNEDY, SUHRHEINRICH, and BATCHELDER, Circuit Judges.

ALICE M. BATCHELDER, Circuit Judge. Defendant-Appellant Jeffrey Saluga ("Saluga") and his fellow defendants appeal the district court's denial of their motion for summary

judgment, based on qualified immunity, against the 42 U.S.C. § 1983 excessive force claim of Plaintiff-Appellee Cyril Turek ("Turek"). Turek cross-appeals the district court's dismissal of his state law false arrest and false imprisonment claims. Because the district court correctly concluded that summary judgment was inappropriate and because we have no jurisdiction to consider Turek's cross-appeal, we will affirm the judgment of the district court.

Statement of Facts[1]

Turek and his wife Candace were divorced in November of 1998. The final divorce decree authorized Candace temporarily to have exclusive possession of the Mahoning County farm that they had jointly owned, though the decree also granted Turek leave to enter the property "for purposes of conducting his farm business and for emergency purposes." Turek's "farm business" was to maintain and feed twice daily the denizens of his barn: forty chickens, ten cats, eight ducks, seven pigs, three horses, two donkeys, two dogs, and a calf. Though the decree entitled Candace to reside on the property until July 30, 1999, by June of 1999 she had moved out, into an apartment. The decree provided that Candace would sell her interest to Turek by July 15, 1999; it also gave Turek the

1. Though there are a number of factual disputes in this case, we present here only the facts as viewed in the light most favorable to Turek. *See Williams v. Mehra*, 186 F.3d 685, 689 (6th Cir. 1999) ("[T]he issue on appeal [of a denial of summary judgment for qualified immunity] is not what facts the parties may be able to prove, but whether the plaintiff's facts, taken at their best, show a violation of clearly established law.") (citing *Johnson v. Jones*, 515 U.S. 304, 311 (1995)).

right to immediate possession once Candace was no longer using the property as her primary residence, but he opted not to exercise this right because of legal formalities involved.

On the hot evening of July 21, 1999, Turek arrived at the farm at around 9:40 p.m.—his first visit to his animals for the afternoon feeding. At the farm he was surprised to find a party underway: ten cars were in the driveway of the house, the doors of the house were open, and inside his 19 year-old son "C.J." was drinking beer with a number of his under-age friends. Turek told them they would have to leave; when they refused, he called the Mahoning County Sheriff's office and reported that minors were drinking alcohol on his property. (Turek himself had had nothing to drink, nor did he then.) C.J. then called Candace, who soon afterward arrived and found Turek in the barn feeding the animals.

Officer Saluga arrived about two minutes later, at 10:15; Turek met him in the driveway and asked him to break up the party. Saluga told Turek that he wanted to talk to Candace, and while Saluga returned to the house, Turek resumed his feeding chores. Candace presented to Saluga a copy of the divorce agreement, explaining that she had the exclusive right to reside in the house, that Turek had already been to the barn earlier in the day and had completed his farm work then, and that he had come back only to drink and to harass her and C.J.

Saluga returned to the barn and told Turek that he had to leave immediately, and though Turek offered to show him the divorce papers and said he would leave as soon as he finished feeding the animals, Saluga was not satisfied, telling

Turek that according to Candace he had already fed the animals at 5:00 that afternoon. Turek explained that this was incorrect—that he had been on his way back from Ashtabula at that time, and that because of the heat it was imperative that he take care of the animals before he left—but Saluga nonetheless told him that he had to leave then or be arrested. Saluga later admitted that he had understood that Turek was one of the owners of the property (though he was in fact at this time the sole owner); that his understanding was that if Turek was the owner, he would have the right to order the teenagers off the property; that there was nothing in the decree that set a time limit for Turek's farm work; that neither Candace nor C.J. had indicated that Turek had threatened them; that Turek had not threatened him personally, nor had Turek done anything violent; that he had not been concerned for his personal safety; and that he had not seen Turek drinking, nor did Turek lose his balance or fall down, nor did Turek act in a way indicating that he was on drugs.

Saluga then arrested Turek, though he first asked him whether there was "anything wrong" with him. Turek told him that he had nerve damage in his right arm and shoulder, and that Saluga should handcuff him in the front and not in the back. Saluga told him that handcuffing in front was against department policy, and proceeded to handcuff him from behind—Turek offering no resistance. Turek immediately told Saluga that the cuffs were too tight and that his arm was hurting, but Saluga was impassive and led Turek up the driveway while holding the chain between the cuffs—Turek continuing to complain that they were too tight and his hands were numb.

Appendix A

Saluga had Turek sit on a rock near his car (because Saluga had a police dog inside the car), while he talked with Candace—Turek again calling out in vain about the tight cuffs to the officer, who was about ten feet away. After a while another police car arrived and the officers loaded Turek in, though they had him sit in the car for some time while they talked with Saluga. They, too, ignored his complaints about the cuffs, and they left Saluga's cuffs on Turek until they arrived at the station. Turek spent several hours in jail and then was released on bond.

By the time the officers removed the cuffs from Turek at the station, both his hands were completely numb. The feeling in his left hand began to return while he was still at the station, but when the feeling in his right hand did not return even after several weeks and the hand proved unusable, he contacted a neurologist and was scheduled for an appointment in August. The neurologist indicated that the cuffs had caused a new neurologic injury to the ulnar nerve of Turek's right wrist, resulting in the loss of function to his right hand. Turek continues to have significant disability and loss of function with his right hand.

I. Qualified Immunity for Excessive Force in Handcuffing

We review *de novo* an interlocutory appeal of a denial of summary judgment predicated on a claim of qualified immunity. *Mattox v. City of Forest Park*, 183 F.3d 515, 519 (6th Cir. 1999). The first question is whether the facts alleged, taken in the light most favorable to Turek, show that Saluga violated a constitutional right. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). We have held that the right to be free from

excessive force is a Fourth Amendment right, and that an excessive force claim may be based on handcuffing. *See Walton v. City of Southfield*, 995 F.2d 1331, 1342 (6th Cir. 1993) ("An excessive use of force claim could be premised on [the officer's] handcuffing [the plaintiff] if he knew that she had an injured arm and if he believed that she posed no threat to him.").[2] Hence the question turns to whether Saluga's alleged actions violated that right. Turek alleged that he posed no threat to Saluga, that he had nerve damage in his right arm and shoulder, that he communicated this to Saluga, and that Saluga nevertheless handcuffed him too tight and refused to loosen the handcuffs when requested. This sufficed to establish a violation of Turek's constitutional right not to be subjected to any objectively unreasonable use of force.

The next question is whether this right was clearly established—that is, "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier*, 533 U.S. at 202. This in turn compels us to give careful attention to the facts and circumstances of this particular case, including the severity of Turek's allegedly criminal activity, whether Turek posed

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2. Saluga argues that *Walton* is no longer good precedent, because in *Walton* we did not conduct the reasonableness inquiry that the Supreme Court later required in *Saucier*, and instead concluded that summary judgment was inappropriate because there was a material issue of fact regarding whether the officer in fact used excessive force. *See Walton*, 995 F.2d at 1342. Nevertheless, though *Saucier* modifies this part of *Walton*, it does not disturb our finding in that case that an excessive force claim can be premised on handcuffing.

an immediate threat to Saluga's safety, and whether Turek actively resisted arrest or attempted to evade arrest by flight. *See Graham v. Connor*, 490 U.S. 386, 397 (1989). We must also ask whether even if Saluga made a mistake, that mistake was nevertheless reasonable given what he knew at the time. *Saucier*, 533 U.S. at 206.

Viewing the facts in the light most favorable to Turek, we find that Saluga knew that Turek had an injury because he asked him about it, Turek described his injuries and asked Saluga to handcuff him in front, and Turek complained about the tightness of the handcuffs. Additionally—looking to the *Graham* factors—Turek's "crime" was not severe, he posed no threat to Saluga's safety, and he made no attempt to resist the arrest. Though Saluga correctly told him that it was against department policy to handcuff in front, the Mahoning County Sheriff's Policy Manual also provided an exception: "All persons taken into custody shall be handcuffed with their hands behind their backs. Where the health and safety of the suspect might be compromised, the suspect may be handcuffed with the hands in front." In light these facts, which for purposes of the summary judgment motion we presume to be true, we find that Saluga's conduct given what he knew at the time was not reasonable, and the district court properly denied summary judgment.

II. Jurisdiction over Cross-Appeal of Dismissed State Law Claims

Turek requests that we consider his cross-appeals of his false arrest and false imprisonment claims that the district court dismissed, and invokes the collateral order doctrine

and pendent appellate jurisdiction. Fed. R. Civ. P. 54(b) additionally allows a district court to enter final judgment prematurely under special circumstances (thus permitting an immediate appeal of the issue), but the district court did not do so in the present case.

In *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) the Supreme Court created the collateral order doctrine—a narrow exception to the final judgment rule for a "small class" of prejudgment orders. *Id.* at 546. The Court has since explained that to qualify, an order must (among other things) "be effectively unreviewable on appeal from a final judgment." *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 431 (1985) (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)). There is no reason why Turek cannot appeal the dismissal of his claims after his case ends in a final judgment, and hence this doctrine does not render his claim reviewable.

Pendent appellate jurisdiction would be appropriate here only if Turek's false arrest and imprisonment claims were inextricably intertwined with his § 1983 claim, or if we had to address the dismissal of the former in order to meaningfully review the latter. *Swint v. Chambers County Comm'n*, 514 U.S. 35, 51 (1995). Though there is some factual overlap between Turek's state law claims and his § 1983 claim, the issues are not nearly inextricable: Saluga could have used excessive force even if he had a legal reason to arrest Turek, and vice versa.

Appendix A

Conclusion

For the foregoing reasons, we AFFIRM the judgment of the district court denying summary judgment.

APPENDIX B — MEMORANDUM OPINION AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION DATED SEPTEMBER 12, 2001

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 4:00 CV 1672

CYRIL TUREK,

Plaintiff,

vs.

JEFFREY SALUGA, et al.,

Defendants.

MEMORANDUM OPINION
(Resolving Docket No. 36)

Magistrate Judge James S. Gallas

Cyril Turek brought this civil rights and common law tort action against Deputy Sheriff Jeffrey Saluga, Sheriff Randal Wellington, the Mahoning County Sheriff's Department, the Mahoning County Commissioners (in their official capacity only) and Mahoning County alleging illegal arrest and that he sustained serious bodily injury as a result of this arrest. Turek claims constitutional violations of the Fourth and Fourteenth Amendments of false arrest, false

imprisonment, malicious prosecution, abuse of process and excessive force under 42 U.S.C. §1983 as well as state law based claims of illegal arrest, detention and prosecution and use of unnecessary, unreasonable force. Defendants have moved for summary judgment.

Under Rule 56 of the Federal Rules of Civil Procedure granting a motion for summary judgment is only proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. In determining whether there is a genuine issue of material fact all inferences drawn from the underlying facts contained in affidavits, pleadings, responses to discovery requests, and depositions must be viewed in the light most favorable to the party opposing the motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *United States v. Diebold, Inc.*, 369 U.S. 654, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962). A court must inquire "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The court may not make credibility determinations or weigh the evidence when ruling on a motion for summary judgment. *Anderson*, 477 U.S. at 255. The burden is upon the movant to demonstrate the absence of a genuine issue of material fact. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970); *Smith v. Hudson*, 600 F.2d 60, 63 (6th Cir. 1979), *cert. dismissed* 444 U.S. 986 (1979). However, the nonmoving party is obliged to produce some evidence other than mere pleadings themselves to demonstrate that there is

a genuine issue for trial. *Celotex Corporation v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The nonmoving party must produce significant probative evidence in support of the complaint to defeat the motion for summary judgment through affidavits or admissions on file. *Moore v. Phillip Morris Cos., Inc.*, 8 F.3d 335, 339-40 (6th Cir. 1993). In the final analysis, "the threshold inquiry . . . [is] whether there is a need for trial — whether in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson*, 477 U.S. at 250; *Moore*, 8 F.3d at 340. Once the nonmoving party has responded, the court must view the facts in the light most favorable to the nonmoving party. *Darrah v. City of Oak Park*, 255 F.3d 301, 304 n.1 (6th Cir. 2001).

The underlying cause of the events that were to follow was the November 1998 judgment entry and final divorce decree between Turek and Candace Turek. As former husband and wife the couple was left with joint ownership of a farm in Ellsworth Township, Mahoning County over which they agreed that Candace Turek was to be entitled to exclusively reside there until July 30, 1999, but during this time Turek was to be "permitted on the property for purposes of conducting his farm business and for emergency purposes." By July 1999 Candace Turek had removed her property from the premises and rented an apartment in nearly Canfield. Turek had not moved into the residence but did continue farming operations. On the fateful night of July 21, 1999 (very close to the end of the divorce decree's limit on her occupancy) Candace made accusations which led to Turek's arrest.

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Turek claims that he arrived at the farm between 9:00 and 10:00 p.m. after stopping by his girlfriend's residence. He found 10 cars in the drive, doors to the house wide open and a number of underage teenagers drinking including his 19-year old son. Turek threatened to call the police if they did not leave. The teenagers refused so Turek called the Mahoning County Sheriff for assistance. Meanwhile, Turek's son called Candace Turek, who came a few minutes before the deputy sheriff arrived.

Deputy Sheriff Saluga was dispatched and arrived on the farm where he talked to Turek first at about 10:15 p.m. Turek told the deputy sheriff he wanted his sons and friends thrown off his property. Deputy Saluga then spoke to Candace who was sitting on the porch with her son and who happened to have a copy of the divorce agreement with her which she presented to the deputy. On page 6 of this agreement there was a provision permitting Turek's presence for the limited purposes of conducting his farm business and on page 7 of the agreement it provided that Candace Turek "no longer was the marital residence as her primary residence [Turek] shall be entitled to take immediate possession." After speaking to the deputy, Turek went to the barn and claims he was tending his animals. Deputy Saluga after speaking to Candace made the following note in his report:

> After investigating and reading the agreement it was found that Cyril Turek was allowed on the property of 8995 N. Palmyra to attend to his farm animals (3 horses and some chickens) and the approximate time of this maitnance (sic) should only take 1 hour tops. It was found that Mr. Turek

had been at the residence at 5:00 pm. until around 6:30 p.m. left and then returned at 8:30 p.m., until the time I arrived at 10:30 p.m. According to his son and ex-wife Candice, his work was done the first time he was there and only returned to hang around and harass them and drink his beer.

Upon speaking with Mr. Turek I did smell a strong odor of an alcoholic beverage about his breath. I asked him when he was planning on leaving because it was 11:00 p.m. and was a little late for doing any more work in the barn. He stated he would be there all night.

I then advised Mr. Turek that it was time for him to leave for the night. He claimed to me he wasn't going anywhere, this was his property and he would do what he wants.

I then advised him he would be placed under arrest for criminal trespass and violating a consent agreement. He stated to me if I wanted him to leave I would have to come in the barn and get him because he wasn't going. Therefore I went in and got him and removed him from the barn, he was placed under arrest and charged with the above. He was then transported to the Mahoning County Justice Center for safekeeping.

The consent agreement states: permitted on property for purposes of conducting his farm business and for emergency purposes *only*.

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Saluga found Turek in the barn and Turek was arrested for "criminal trespass" and "violating consent agreement" and charged under Ohio Revised Code §2911.21 (criminal trespass) and §2919.27 (violating a protection order or consent agreement). Deputy Saluga wrote on the arrest supplement that both were misdemeanors of the first degree, but in fact criminal trespass is a misdemeanor of the fourth degree.

According to Turek, Deputy Saluga specifically asked him if there was anything wrong with him. Turek responded that he had an injury to his right arm and shoulder and he requested to be handcuffed in front rather than behind his back. Deputy Saluga did note in his report "bad right shoulder." Nonetheless Deputy Saluga handcuffed Turek from behind his back and Turek claims the deputy pulled his arms and excessively tightly handcuffed him. Turek claims his hands became numb and he complained that his handcuffs were too tight and that he was in pain. However, nothing was done by either Deputy Saluga or the officers who responded to Deputy Saluga's call to remove and transport Turek.

Subsequently in July 1999 an assistant county prosecutor reviewing the charges dismissed them for the reasons, "insufficient witness statements articulating a criminal act and "case file incomplete at the time to charge the arrestee/alleged defendant." Turek never faced trial on the charges.

Following dismissal of the charges, Turek made an appointment with a neurologist who examined Turek on August 24, 1999 and concluded that the handcuff injury caused a new neurologic injury to the ulnar nerve of the right wrist resulting in loss of function of the right hand. Turek claims to have

significant disability due to the loss of function with his right hand.

Probable Cause and Qualified Immunity

It is well established that "arrest without a warrant" does not violate the Fourth Amendment if probable cause exists for the arresting officer's belief that a suspect has violated or has violated the law." *Criss v. City of Kent*, 867 F.2d 259, 262 (6th Cir. 1988); *Thompson v. Ashe*, 250 F.3d 399, 408 (6th Cir. 2001). "Resolution requires that the court to examine "whether at that moment the facts and circumstances within [the officer's] knowledge and of which [the officer] had reasonable trustworthy information were sufficient to warrant a prudent man in believing the [suspect] had committed or was committing an offense." *Thompson*, 250 F.3d at 408, quoting *Donovan v. Thames*, 105 F.3d 291, 298 (6th Cir. 1997); and *Beck v. Ohio*, 379 U.S. 89, 91, 85 S.Ct. 223, 13 L.Ed.2d. 142 (1964). Probable cause requires more than mere suspicion, but does not require that the officer "possess evidence sufficient to establish a *prima facie* case at trial, much less evidence sufficient to establish guilt beyond a reasonable doubt." *U.S. v. Strickland*, 144 F.3d 412, 416 (6th Cir. 1998). All that is required is that the officer be able to articulate facts which reasonably and objectively demonstrate that the offense was committed. *Id.*

Criminal trespass generally is to knowingly remain on the land or premises of another without privilege to do so.[1] It is

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1. **§2911.21 Criminal trespass.**

(A) No person, without privilege to do so, shall do any of the following:

(Cont'd)

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(Cont'd)

(1) Knowingly enter or remain on the land or premises of another;

(2) Knowingly enter or remain on the land or premises of another, the use of which is lawfully restricted to certain persons, purposes, modes, or hours, where the offender knows he is in violation of any such restriction or is reckless in that regard;

(3) Recklessly enter or remain on the land or premises of another, as to which notice against unauthorized access or presence is given by actual communication to the offender, or in a manner prescribed by law, or by posting in a manner reasonably calculated to come to the attention of potential intruders, or by fencing or other enclose manifestly designed to restrict access;

(4) Being on the land or premises of another, negligently fail or refuse to leave upon being notified to do so by the owner or occupant, or the agent or servant of either.

(B) It is no defense to a charge under this section that the land or premises involved was owned, controlled, or in custody of a public agency.

(C) It is no defense to a charge under this section that the offender was authorized to enter or remain on the land or premises involved, when such authorization was secured by deception.

(D) Whoever violates this section is guilty of criminal trespass, a misdemeanor of the fourth degree.

(E) As used in this section, "land or premises" includes any land, building, structure, or place belonging to, controlled by, or in custody of another, and any separate enclosure or room, or portion thereof.

Anderson (1999).

significant that Turek did not invoke the possession clause from page 7 of the divorce decree. Granted as Turek points out, he was a legal owner of the land or premises. Defendants rely on, *State v. O'Neal*, 87 Ohio St.3d 402, 721 N.E.2d 73 (2000), and *State v. Lilly*, 87 Ohio St.3d 97 (1999), which were issued subsequent to these events. These decisions are arguably both groundbreaking and radical departures from the state of the law in July 1999. Notwithstanding that, looking to the appellate court's decision in *Lilly*, which was later reversed, it is clear that even in July 1999, Deputy Saluga had probable cause based on the law *extant*. In *State v. Lilly*, 1998 WL 272140 (Ohio App. 2 Dist. May 29, 1999), the court vacated the criminal trespass conviction arising from a domestic violence incident reasoning.

> R.C. 3103.04 provides, 'Neither [husband nor wife] can be excluded from the other's dwelling, except upon a decree or order of injunction made by a court of competent jurisdiction.' In *State v. Herder* (1979), 65 Ohio App.2d 70, 75-76, 415 N.E.2d 1000, the court explained, 'In light of the clear policy expression set forth in R.C. 3103.04, one spouse cannot be criminally liable for trespass in the dwelling of the other.' See, also, *State v. Brooks* (1995), 101 Ohio App.3d 260, 268, 655 N.E.2d 418; *State v. Middleton* (1993), 85 Ohio App.3d 403, 408, 619 N.E.2d 1113. The record in this case is devoid of evidence that a court of competent jurisdiction had issued a decree or order excluding Lilly from Jacqueline Lilly's apartment.

In contrast, Candace Turek did have a decree order excluding Turek from the possession except for farming and emergency purposes. Thus for purposes of §2911.21(E) the "land or premises" was controlled by or in the custody of another to allow for the charge of criminal trespass. Candace Turek had demonstrated with a copy of the divorce decree that she had exclusive right to the property except in these two instances. It was 11:00 p.m. and the animals which Turek purportedly was there to care for, would in their natural state be sleeping. Moreover, the deputy had been told by Candace that Turek had been at the farm earlier that day and had completed his farming chores. There was no apparent emergency situation, and it appeared to the deputy that Turek was there to drink and not work. Consequently, there was probable cause under the circumstances to support the warrantless arrest.

This moots Turek's second claim of lack of probable cause for arrest for violating a consent agreement order under Ohio Rev. Code §2919.27. Turek's arguments are correct that the protection order and consent agreement that is the subject of the statute relates to domestic violence and not division of property as the Turek divorce decree.[2] Defendants

2. **§2912.27 Violating protection order or consent agreement.**

(A) No person shall recklessly violate the terms of any of the following;

(1) A protection order issued or consent agreement approved pursuant to section 2919.26 or 3113.31 of the Revised Code.

(Cont'd)

implicitly concede that Deputy Saluga lacked probable cause to arrest Turek on this charge from their focus on the criminal trespass issue. Moreover, the deputy lacked qualified immunity because Turek's actions did not violate the statute. See *State v. Dietrich v. Burroughs*, 167 F.3d 1007,1010-12 (6th Cir. 1999); *Painter v. Robinson*, 185 F.3d 557 (6th Cir. 1999). The deputy simply did not "*know* a crime had occurred." *U.S. v. Barrett*, 890 F.2d 855, 861 (6th Cir. 1989); *U.S. v. Strickland*, 144 F.3d 412 (6th Cir. 1998). There was no evidence before the deputy which would reasonably and objectively be viewed as a violation of the statute. Nonetheless, there was probable cause for the arrest for trespass. Although the situation is distinguishable from that in *Avery v. King*, 110 F.3d 12 (6th Cir. 1997), the court believes that the same legal principle applies, which is that where there is no probable cause to arrest plaintiff for the crime charged, proof of probable cause to a related crime is a defense. Though one of the two charges was invalid, it does not negate the validity of the arrest for criminal trespass. There was probable cause for the arrest.

(Cont'd)

> (2) A protection order issued pursuant to section 2903.213 [2903.21.3] or 2903.214 [2903.21.4] of the Revised Code;
>
> (3) A protection order issued by a court of another state.
>
> (B) Whoever violates this section is guilty of violating a protection order.
>
> . . .

(*Anderson* 1999)

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The reasonableness of the seizure under the Fourth Amendment standard provided probable cause and justified Defendants' actions, except with regard to alleged excessive force. Consequently, summary judgment on Turek's claim for false arrest, false imprisonment, malicious prosecution and abuse of process must be entered in defendants' favor. Although Turek raised both Fourth and Fourteenth Amendment claims, his claims are considered only under the more pertinent Fourth Amendment standard of objective reasonableness, because they are based on an allegedly unconstitutional seizure of the plaintiff. See *Darrah v. City of Oak Park*, 255 F.3d at 305-06; *County of Sacramento v. Lewis*, 523 U.S. 833, 843-44, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998). Accordingly, summary judgment is entered for defendants on Turek's claims for false arrest, false imprisonment, malicious prosecution and abuse of process.

Excessive Use of Force

Defendants raise a qualified immunity defense in response to Turek's allegations of excessive use of force in affecting arrest. Defendants rely on *Saucier v. Katz*, __ U.S. __,121 S.Ct. 2151 (2001), which instructs the court that the first line of inquiry must be whether in the light most favorable to the party asserting injury, the facts show that the officer's conduct violated the constitutional right. *Id.*, 121 S.Ct. at 2156. "If the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate." *Id.*, at 2156-57.

Accordingly, the court must first determine whether the plaintiff has shown a violation of a constitutionally protected right, and secondly to then determine whether the right was "clearly established at the time such that a reasonable official would have understood that his behavior violated that right." *Bonnell v. Lorenzo*, 241 F.3d 800, 824 (6th Cir. 2001); *Summar on Behalf of Summar v. Bennett*, 157 F.3d 1054, 1059 (6th Cir. 1998); *Key v. Grayson*, 179 F.3d 996, 999 (6th Cir. 1999), *cert. denied*, 528 U.S. 1120 (2000); *Conn v. Gabbert*, 526 U.S. 286, 119 S.Ct. 1292, 1295, 143 L.Ed.2d 399 (1999). Both these questions are answered by *Martin v. Heideman*, 106 F.3d 1308 (6th Cir. 1997), and *Walton v. City of Southfield*, 995 F.2d 1331 (6th Cir. 1993), which held that there was potentially excessive force when overly tight handcuffs produced injury. More to the point, *Walton* involved handcuff injury to an arrestee with a shoulder injury.

Deputy Saluga was aware that Turek had at least a "bad right shoulder" and the sheriff's policy allowed for handcuffing in front:

> V. Use of Restraints - Handcuffs
>
> All persons taken into custody shall be handcuffed with their hands behind their backs. Where the health and safety of the suspect might be compromised, the suspect may be handcuffed with the hands in front. Suspects should be handcuffed before being searched whenever deputies are conducting an arrest.

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The following rules apply to the use of handcuffs:

1. Except under exceptional circumstances, do not handcuff a prisoner to a fixed object (e.g. post, vehicle, building, etc.)

2. Never handcuff yourself to a prisoner.

3. Do not use handcuffs as a "come along."

Mahoning County Sheriff's Policy Manual Use of Force Policy.

According to Turek, the deputy would not allow handcuffing in front stating it was against department policy. Further, there is consensus that Turek was not resisting arrest. These facts place in issue the question whether excessive force was used. Accordingly, summary judgment must be denied on the issues of whether excessive force was in fact used and qualified immunity.

Official Capacity Litigants:

Defendants argue that a suit against the county, sheriff's department, county commissioners and sheriff in his official capacity must be dismissed because there was no policy implemented which resulted in injury to Turek. It is correct that the suit against officers in their official capacities is a suit against the county itself. *Marchese v. Lucas*, 758 F.2d 181 (6th Cir. 1983); *Mathews v. Jones*, 35 F.3d 146 (6th Cir. 1994); and see *Kentucky v. Graham*, 473 U.S. 159, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985). Since the excessive force claim

has not been resolved on summary judgment, there is a constitutional tort where potential governmental liability remains to be examined. See, *Scott v. Clay County, Tenn.*, 205 F.3d 867, 879-880 (6th Cir. 2000), *cert. denied*, 531 U.S. 874 (2000). Turek alleges "vicarious liability" by the Mahoning County Sheriff for failing to properly train and supervise Deputy Saluga on the law of arrest, probable cause obeying court orders, and handcuffing procedures. In addition Turek alleges that Deputy Saluga's actions constituted a pattern of abusive police conduct and that the sheriff and county knew or should have known of similar incidents in which Deputy Saluga exhibited this pattern of conduct, thereby showing reckless disregard or deliberate indifference to abusive conduct. Turek supports these claims only with the alleged actions of the deputy in this one instance and with reference to the written sheriff's policy which allows an arrestee to be handcuffed in front when the health and safety of the arrestee may be compromised.

There is no vicarious liability under respondeat superior against the governmental employer. *Collins v. City of Harker Heights, Texas*, 503 U.S. 115, 120, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992). Congress did not intend a municipality to be liable unless the action complained of was pursuant to official municipal policy, as established by custom, or policy including policy of deliberate indifference. See *Collins*, 503 U.S. at 118, 112 S.Ct. at 1065; *Monell v. New York City Department of Social Services*, 436 U.S. 665, 691, 98 S.Ct. 2018, 2036, 56 L.Ed.2d 511(1978); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 477, 106 S.Ct. 1292, 1297, 89 L.Ed.2d 452 (1986); *City of Canton v. Harris*, 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989); *Board of County*

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Commissioners of Bryan Cty., OK v. Brown., 520 U.S. 397, 117 S.Ct. 1382, 137 L.Ed.2d 626 (1997). With respect to the assertion of failure to properly train, a municipality may only be held liable under § 1983 if its failure to train reflects deliberate indifference:

> Only where a municipality's failure to train its employees in a relevant respect evidences a 'deliberate indifference' to the rights of its inhabitants can such a shortcoming be properly thought of as a city 'policy or custom' that is actionable under Section 1983 . . . Only where a failure to train reflects a 'deliberate' or 'conscious' choice by a municipality — a 'policy' as defined by our prior cases — can a city be liable for such failure under Section 1983.

City of Canton v. Harris, 489 U.S. at 389, 109 S.Ct. at 1205. "The plaintiff must also demonstrate that, through its deliberate conduct, the municipality was the 'moving force' behind the injury alleged. That is, a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights" *Board of County Commissioners*, 520 U.S. at 404, 117 S.Ct. at 1388. An isolated incident by the police does not establish an official municipal policy. *Board of County Commissioners*, 520 U.S. at 405, 117 S.Ct. at 1389; *Oklahoma City v. Tuttle*, 471 U.S. 808, 824, 105 S.Ct. 2422, 2436, 85 Ed.2d 791 (1985). The Defendants are correct that Turek has not shown any policy, custom or indifference. Turek has not shown that the county or sheriff was aware of

prior unconstitutional action by its employee. See *City of Canton*, at 390-91. Turek has only demonstrated an isolated incident and has not demonstrated deliberate indifference by set policy or custom. In fact Turek maintains that the incident violated the written sheriff's policy of permitting handcuffing in front. Consequently, summary judgment must be entered to dismiss the claims against the Sheriff, Mahoning County Sheriff's Department, the county commissioners, and Mahoning County.

Immunity from state law based claims:

Turek has included pendent state claims of illegal arrest, detention and prosecution and use of unnecessary, unreasonable and excessive force by Deputy Saluga, which were done with malicious purpose or in a wanton or reckless manner. Defendants argue against Turek's abuse of process claim, but it is clear that in the complaint this claim is designated as a "civil rights" claim and as a violation of Turek's constitutional rights. It is not raised as a violation of state law. Nevertheless, with regard to the state law claims, Ohio's Political subdivisions Tort Liability Act, Ohio Rev. Code Chapter 2744, confers immunity for the actions of an employee *unless* the employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner. See Ohio Rev. Code §2744.03(A)(6).

Again, the existence of probable cause eliminates all but the excessive force claim. However, there are genuine issues of material fact surrounding the handcuffing incident. Malice is a conscious disregard for the rights and safety of others that has a great probability of causing substantial harm.

Preston v. Murty, 32 Ohio St.3d 334 (1987). Wanton conduct is "the failure to exercise any care whatsoever toward someone to whom a duty of care is owed under circumstances in which there is a great probability that harm will result." *Hawkins v. Ivy*, 50 Ohio St.2d 114 (1977). Reckless conduct is perversely disregarding a known risk. *Poe v. Hamilton*, 56 Ohio App.3d 137 (1990). Turek's allegation in his affidavit are sufficient to raise material issues of fact requiring denial of summary judgement on the state law based excessive force claim.

CONCLUSION

For the foregoing reasons Defendants' motion for summary judgment is granted to dismiss all claims except for the excessive force claim against Deputy Saluga in his individual capacity.

s/ James S. Gallas
United States Magistrate Judge

Dated: September 12, 2001

Appendix B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 4:00 CV 1672

CYRIL TUREK,

Plaintiff,

vs.

JEFFREY SALUGA, et al.,

Defendants.

JUDGMENT ENTRY

Magistrate Judge James S. Gallas

For the reasons explained in the concomitant memorandum opinion, the Defendants' motion for summary judgment is granted in part dismissing Plaintiff's claims of false arrest, false imprisonment, malicious prosecution, abuse of process, and illegal arrest, detention and prosecution with judgment entered pursuant to Rule 56 of the Federal Rules of Civil Procedure. However, the motion is denied with respect to Plaintiff's claims of excessive force, and unnecessary and unreasonable force only with respect to Defendant Jeffrey Saluga. The other Defendants are dismissed.

IT IS SO ORDERED.

s/ James S. Gallas
United States Magistrate Judge

Dated: September 12, 2001

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED NOVEMBER 18, 2002

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

01-3986/4018

CYRIL TUREK,

Plaintiff-Appellee/Cross-Appellant,

v.

JEFFREY SALUGA,

Defendant-Appellant/Cross-Appellee,

RANDALL WELLINGTON,
MAHONING COUNTY SHERIFF, ET AL.,

Defendants.

ORDER

BEFORE: KENNEDY, SUHRHEINRICH, and BATCHELDER, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote

on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
Leonard Green, Clerk